Supreme Court, U.S.
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No. 88-984

In The

Supreme Court of the United States

October Term, 1988

OSVALDO ALVAREZ,

Petitioner,

v.

TRANS WORLD AIRLINES, INC., and INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS DISTRICT LODGE 142,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT TWA'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW[1]

1. Does denial of a Motion for Summary Judgment by a trial court *ipso facto* require denial of a Motion for Directed Verdict after presentation of a Plaintiff's case-in-chief?

2. Does Federal Rule of Civil Procedure 39(c) require an advisory jury, when requested, on issues not triable by jury?

3. Must a federal district court exercise pendent party jurisdiction when requested?

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[1]Alvarez also raises two other issues in his Petition for Writ of Certiorari; however, these two issues (numbers 1 and 3 from Alvarez's Petition for Writ of Certiorari) are not directed toward Trans World Airlines, Inc., and, accordingly, will not be addressed herein. These are fully discussed in the Union's Brief in Opposition to Petition for Writ of Certiorari.

PARTIES

Petitioner Osvaldo Alvarez is a former employee of Trans World Airlines, Inc. ("TWA"), who was terminated by TWA for just cause as determined by the System Board of Adjustment. Alvarez was the plaintiff in the Federal District Court for the Southern District of Florida and the appellant before the Eleventh Circuit Court of Appeals.

Respondent TWA was Alvarez's employer prior to Alvarez's termination for attempting to receive two paychecks for the same pay period. TWA was a co-defendant and co-appellee below.

Respondent International Association of Machinists & Aerospace Workers District Lodge 142 (the "Union") is an employee union that represented Alvarez during the grievance process following Alvarez's termination. The Union was a co-defendant and co-appellee below.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
JURISDICTION	1
STATUTES INVOLVED	2
COUNTERSTATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	5
ARGUMENT	6
A. No Rule Of Law Requires A Trial Court To Deny A Motion For Directed Verdict Simply Because It Previously Denied A Motion For Summary Judgment	7
B. The Trial Court Was Not Under Any Obligation To Use An Advisory Jury Under Rule 39(c) As To Alvarez's Title VII Claim Against TWA	9
C. The Trial Court Had No Obligation To Exercise Pendent Party Jurisdiction	10
CONCLUSION	12

TABLE OF AUTHORITIES

Page

CASES

Aldinger v. Howard, 427 U.S. 1 (1976) 10

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505 (1986) 8, 9

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986) 8, 9

International Association of Machinists v. Central Airlines, Inc., 372 U.S. 682 (1963) 3

Leach v. Pan American World Airways, 842 F.2d 285 (11th Cir. 1988) 9

Lehman v. Nakshian, 453 U.S. 156 (1981) 9

Lykins v. Pointer, Inc., 725 F.2d 645 (11th Cir. 1984) 11

United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966) 11

STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 2000e 2

45 U.S.C. § 151 ..... 2, 3

45 U.S.C. § 181 3

RULES

Fed. R. Civ. P. 39(c) 5, 9, 10

Sup. Ct. R. 17 12

Sup. Ct. R. 22 1

No. 88-984

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT TWA'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Trans World Airlines, Inc. ("TWA"), Respondent herein and Appellee and Defendant in the courts below, submits this Brief in Opposition to Petition for Writ of Certiorari, in accordance with Rule 22 of this Court.[2]

JURISDICTION

Petitioner asserts jurisdiction under 28 U.S.C. § 1254 (1); however, Petitioner has made no showing that this

[2]Sup. Ct. R. 22.

Court should exercise its judicial discretion. There are here presented no important questions of "federal law" nor previously unsettled issues.

STATUTES INVOLVED

42 U.S.C. § 2000e, Title VII, Equal Employment Opportunity Act, and 45 U.S.C. § 151, *et seq.*, Railway Labor Act.

COUNTERSTATEMENT OF THE CASE

Petitioner's fourteen page "Statement of the Case" contains deceptions, misstatements, unsupported facts, and outright falsehoods. Respondent, Trans World Airlines, Inc. ("TWA"), will resist the temptation to refute each of these allegations and, instead, will simply present the *relevant* information needed by this Court to address the questions presented for review by the Petitioner.[3]

Petitioner, Osvaldo Alvarez ("Alvarez"), was an employee of TWA who was terminated for attempting to receive two checks for the same pay period. Alvarez sought the assistance of the International Association of Machinists & Aerospace Workers District Lodge 142 (the "Union") to represent him in filing a grievance against TWA pursuant to the collective bargaining agreement between TWA and the Union.

The Union represented Alvarez, a union member, throughout the grievance proceedings and, ultimately, at

[3]In order to provide a complete factual overview, TWA will also include facts pertinent to the two questions submitted by Petitioner (numbers 1 and 3) that are not addressed by TWA—questions fully addressed in the Union's Brief in Opposition.

the final arbitration hearing before the System Board of Adjustment.[4]

The System Board of Adjustment denied the grievance and found that TWA had terminated Alvarez for just cause.

Alvarez then brought the instant action against the Union and TWA, alleging (1) that the Union breached its duty to fairly represent Alvarez at the System Board of Adjustment hearing; and (2) that TWA had violated Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, by discharging Alvarez in retaliation for prior national origin discrimination claims. Alvarez also included a plethora of other counts[5] that were dismissed by the trial court, which dismissals were affirmed by the Eleventh Circuit in its *per curiam* decision of September 13, 1988, attached hereto as TWA-1.[6]

The essence of Alvarez's first claim was that the Union breached its duty to fairly represent Alvarez (a) by failing to hire an attorney to represent Alvarez before the System Board of Adjustment; and (b) by failing to introduce evidence of a decision of the Florida Unemployment Appeals Commission and arguing that its findings would necessitate a finding by the System Board of Adjustment that Alvarez was not terminated for just cause.

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[4]The System Board of Adjustment is the arbitration body responsible for final and binding arbitration as mandated by the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, which has been extended to apply to airlines and its employees by § 181, *et seq.*, Title II. *See International Association of Machinists v. Central Airlines, Inc.*, 372 U.S. 682 (1963).

[5]None of these other counts are pertinent to Alveraz's Petition for Writ of Certiorari.

[6]References to TWA's Appendix will be in the form "TWA-*n*" where *n* is the page number.

Alvarez's claim against TWA for retaliatory discharge essentially alleged that Alvarez was terminated for filing a prior claim of discrimination and/or for being a suspected FBI agent and *not* for attempting to receive two checks for one pay period.[7]

The trial court denied Motions for Summary Judgment filed by the Union and TWA and ordered a sequential trial of Alvarez's two claims: a jury trial as to Alvarez's claim against the Union, with the Court simultaneously hearing evidence as to Alvarez's claim against TWA for Title VII retaliatory discharge, and then a bench trial wherein Alvarez could introduce any additional evidence going toward his claim against TWA for retaliatory discharge.

Additionally, the trial court denied Alvarez's eleventh-hour motion to amend his Complaint to bring a state-law claim of negligence against his bank.[8]

After the conclusion of the jury trial as to the breach of duty by the Union to fairly represent Alvarez before the System Board of Adjustment, the district court directed a verdict for the Union and TWA[9] and proceeded to hear additional evidence as to the Title VII claim. After additional evidence was presented by Alvarez, the district

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[7]Alvarez argued that TWA fabricated the circumstances leading up to the "discovery" that Alvarez had received two pay checks for one pay period as an excuse for terminating Alvarez.

[8]Alvarez sought to add his bank as a party defendant to this action and to add a claim for negligence against that bank. Alvarez contends that the district court erred by not exercising pendent party jurisdiction over this wholly state law claim between non-diverse parties.

[9]TWA was a nominal party to this first trial inasmuch as the relief sought by Alvarez—reinstatement—required that TWA be a party in the event Alvarez succeeded in proving that the Union had breached its duty to fairly represent Alvarez.

court then granted TWA's Rule 41(b) motion for involuntary dismissal of Alvarez's Title VII claim and entered formal findings of fact and conclusions of law.

Alvarez appealed to the Eleventh Circuit which heard oral argument and then issued a *per curiam* decision affirming the district court's decision in all respects. *See* TWA-1. This Writ for Certiorari followed.

SUMMARY OF THE ARGUMENT

The Petitioner has raised five issues that he contends merit this Court granting a Writ of Certiorari.

None of Petitioner's issues present any important federal question. Of the three questions addressed by Respondent, Trans World Airlines, Inc., all are patently frivolous. Petitioner is simply seeking yet another redetermination of the propriety of the decisions of the trial court.

It is not an important federal question whether a denial of a Motion for Summary Judgment precludes the granting of a later Motion for Directed Verdict by the same party. Additionally, contrary to Petitioner's contention, this Court has never held otherwise.

Moreover, Rule 39(c), Federal Rules of Civil Procedure, is clearly a discretionary measure: a trial court "*may* try any issue with an advisory jury." The Rule does not mandate trial by jury simply because it was requested. This is not an important or unsettled federal question.

Finally, Petitioner's contention that this Court should decide, within the context of this case, whether pendent

party jurisdiction is appropriate is completely without merit. Again, no important federal question has been presented.

In the absence of any important or unsettled federal question (or conflict of law), there is no reason for this Court to review the merits of this case—it has been fully tried before the district court and affirmed, after argument, by the Eleventh Circuit.

———o———

ARGUMENT

Petitioner has raised five issues in support of granting his Petition for Writ of Certiorari. Petitioner argues that the issues raised are important issues of federal law unresolved by this Court or, alternatively, were decided contrary to prior decisions of this Court.[10] Each of these issues is completely devoid of merit.[11]

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[10]The Eleventh Circuit's affirmance was *per curiam,* without opinion.

[11]TWA shall not address the argument of whether the Union breached its duty to fairly represent Alvarez by not providing him with an attorney inasmuch as this issue is fully addressed in the Union's Brief in Opposition and any such discussion herein would be repetitive. Moreover, the argument of Petitioner that the Union breached its duty to fairly represent Alvarez by not arguing issue preclusion before the System Board of Adjustment is fully addressed in the Union's Brief in Opposition. It should be noted, however, that the trial court's scope of review was

(Continued on following page)

A. No Rule Of Law Requires A Trial Court To Deny A Motion For Directed Verdict Simply Because It Previously Denied A Motion For Summary Judgment.

Petitioner, for the first time, now claims that the decision of the trial court denying Defendants' Motions for Summary Judgment precluded a later directed verdict for the Defendants since the same standard applies to both.[12]

Petitioner contends that the trial court's order directing a verdict for the Defendants after previously denying Defendants' Motions for Summary Judgment was "contrary to applicable decisions of this Court."

Absolutely no rule of court precludes a trial court from granting a motion for directed verdict merely because the trial court previously denied motions for summary judgment. Indeed, it was exactly the practice of denying

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(Continued from previous page)

legally limited to whether the failure to introduce the prior decision of the Unemployment Appeals Commission and *argue* issue preclusion before the System Board of Adjustment was a breach of the Union's duty to fairly represent Alvarez. Without making a determination of whether issue preclusion applies to such a situation, the trial court found that the Union had not breached its duty to Alvarez by not making this argument before the System Board of Adjustment.

[12]This issue has not been preserved on appeal and, accordingly, this Court should not address this issue. Petitioner argued before the Eleventh Circuit that the Directed Verdict was improper because (a) the Union was unprepared and unable to represent Alvarez fairly; (b) the Union failed to provide Alvarez assistance of counsel; and (c) the Union failed to argue and the court failed to apply the doctrine of issue preclusion. Nowhere did Petitioner argue that the denial of Defendants' Motions for Summary Judgment had a preclusive effect over a later Motion for Directed Verdict.

motions for summary that led to this Court's watershed cases of *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S. Ct. 2548 (1986), and *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S. Ct. 2505 (1986).

In *Anderson v. Liberty Lobby,* this Court held that the standard for granting a motion for summary judgment is the same as that for granting a motion for directed verdict:

> The petitioners suggest, and we agree, that this standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict.

Anderson v. Liberty Lobby, Inc., 106 S. Ct. at 2511.

Petitioner's contention that the denial of a Motion for Summary Judgment mandates denial of a later Motion for Directed Verdict contains a fatal assumption: that a trial court will never deny a motion for summary judgment when it should be granted.

It was precisely this problem that led to the decisions in *Celotex* and *Liberty Lobby.* Indeed, the trial court stated that it had denied the Motions for Summary Judgment because Defendants' "have a judge who does not believe in summary judgment." TWA-3.

More importantly, once the Court determined that it could have granted Defendants' Motions for Summary Judgment (had the Defendants had a judge who "believed" in summary judgment), it certainly had the authority to direct a verdict at the close of all the evidence.

Notwithstanding Petitioner's position to the contrary, the trial court's decision is not in conflict with a previous decision of this Court. Moreover, since the Court has already spoken to this issue extensively in *Celotex* and *Liberty Lobby*, there is no need for this Court to readdress it in the context of this case.

B. The Trial Court Was Not Under Any Obligation To Use An Advisory Jury Under Rule 39(c) As To Alvarez's Title VII Claim Against TWA.

Initially, it should be noted that Petitioner did not assign error to the trial court's decision to sequentially try Alvarez's claims, jury and non-jury, and, accordingly, this issue has not been preserved for appeal.[13]

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[13]While Petitioner *requested* that the entire case be heard before a jury, the trial court correctly determined that no right to a jury trial existed as to Alvarez's Title VII claim. *Lehman v. Nakshian,* 453 U.S. 156, 164 (1981). Petitioner did not object to the sequential trial arrangement and admitted that the trial court had the authority to hear the case in that manner:

> As far as how you are going to do the trial, that is up to your discretion. That is pretty clear except for the possibility that Mr. Alvarez is deprived of his right to a jury trial. Any way that you organize the case around this Title [VII] count is up to your discretion. If you want to bifurcate it, I think you would be within your discretion to do that.

TWA-5, *quoting* counsel for Alvarez immediately prior to trial when the district court suggested a sequential trial.

Indeed, it has now been determined that there is no right to a jury trial on a breach of duty of fair representation claim. *Leach v. Pan American World Airways,* 842 F.2d 285 (11th Cir. 1988).

Furthermore, no rule of court requires or suggests that the advisory jury option available under Federal Rule of Civil Procedure 39(c) is anything but discretionary. The trial court heard evidence during Alvarez's presentation of his case before the jury on his claim against the Union and then during the subsequent bench trial on Petitioner's Title VII claim. Alvarez apparently suggests that the trial court was incapable of following Alvarez's argument and that the procedure used by the trial court—and acceded to by Alvarez at the time—"deprived Alvarez of the right to a fair trial." This is an impertinent supposition and is hardly an "important question of federal law" requiring this Court's attention.

C. The Trial Court Had No Obligation To Exercise Pendent Party Jurisdiction.

Finally, Alvarez seeks to invoke this Court's discretionary jurisdiction because Alvarez says the United States Supreme Court has never approved the doctrine of pendent party jurisdiction.[14]

Alvarez suggests that the question is "Did the district court err in this case by failing to exercise pendent party jurisdiction?" This should be more accurately stated as follows: "Must a federal district court exercise pendent party jurisdiction when requested?"

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[14]Indeed, this Court appears to disfavor the doctrine of pendent party jurisdiction. *See Aldinger v. Howard*, 427 U.S. 1, 14-15 (1976).

The answer to both these questions is, of course, a resounding "no." Even pendent jurisdiction[15] has been consistently found to be discretionary:

> That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right.

United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966). The Eleventh Circuit has held that this same standard applies to pendent *party* jurisdiction:

> The exericse of pendent party jurisdiction is a *discretionary* decision reserved for the district court.

Lykins v. Pointer, Inc., 725 F.2d 645, 649 (11th Cir. 1984) (emphasis in original; brackets omitted).

Petitioner argues that the trial court failed to apply the "applicable test" in deciding whether to assert pendent party jurisdiction. In affirming the district court's decision, the Eleventh Circuit rejected this suggestion. Petitioner apparently hopes this Court will re-review this decision and find otherwise; however, such second-guessing of the Eleventh Circuit is hardly appropriate at this juncture.

———o———

[15]Pendent jurisdiction involves the addition of state law claims to an otherwise federal case; whereas, pendent *party* jurisdiction necessitates adding additional defendants as well.

CONCLUSION

Petitioner has not shown even one reason why this Court shold review the Eleventh Circuit's *per curiam* affirmance of the district court's judgments. The conflict of decisions between circuits or important questions of federal law necessary to merit this Court's attention are not present in this matter.

"A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." Sup. Ct. R. 17. This is not such a case. The decision of the Eleventh Circuit Court of Appeals was fully consistent with established legal principals.

Respectfully submitted,

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Dated: January 10, 1989

INDEX TO APPENDIX

Page

Decision of the Eleventh Circuit ..... App. 1

Excerpts from the Transcript of Trial Before The Honorable James W. Kehoe and a Jury, February 4, 1987 ..... App. 2

Excerpts from the Transcript of Trial Before The Honorable James W. Kehoe and a Jury, February 2, 1987 ..... App. 4

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-5379

D.C. Docket No. 85-53

OSVALDO ALVAREZ,

Plaintiff-Appellant,

versus

TRANS WORLD AIRLINES, INC. and
INTERNATIONAL ASSOCIATION OF MACHINISTS &
AEROSPACE WORKERS DISTRICT LODGE 142,

Defendants-Appellees.

———o———

Appeal from the United States
District Court for the Southern
District of Florida

———o———

(September 13, 1988)

Before KRAVITCH and EDMONDSON, Circuit Judges, and Hoffman,* Senior District Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

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*Honorable Walter E. Hoffman, Senior U. S. District Judge for the Eastern District of Virginia, sitting by designation.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

OSVALDO ALVAREZ, Plaintiff,	)	No. 85-0053-Civ-KEHOE
vs.	)	Miami, Florida
TRANS WORLD AIRLINES, Defendants.	)	February 4, 1987

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE JAMES W. KEHOE
and a jury

APPEARANCES:

For the Plaintiff:	BRET CLARK, ESQ.
For the Defendant TWA:	SHERRYLL DUNAJ, ESQ.
For the Defendant IAAM:	MICHAEL GORDON, ESQ. and GEORGE TUCKER, ESQ.
Court Reporter:	PAUL HAFERLING 301 North Miami Avenue Miami, Florida 33128

* * *

MR. TUCKER: I would like to make a rule [50] motion to get rid of the case right now.

I don't know where to begin. I am sure you don't want to hear old war stories. I have been doing this for about 20 years now. I do 7 or 8 of these cases a year. The first one I did to a jury trial to my recollection. It is the

second case that has been tried. They are all disposed of on summery judgement [sic] motions, because—

THE COURT: Your problem is you have a judge who does not believe in summary judgement [sic].

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

OSVALDO ALVAREZ, Plaintiff,	)	
	)	NO. 85-0053-Civ-
vs.	)	KEHOE
	)	
TRANS WORLD AIRLINES, Defendants.	)	Miami, Florida
	)	February 2, 1987
	)	9:00 A.M.
	)	

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE JAMES W. KEHOE
and a jury

APPEARANCES:

For the Plaintiff:	BRET CLARK, ESQ.
For the Defendants Trans World Airlines:	SHERRYLL DUNAJ, ESQ.
IAAM:	MICHAEL GORDON, ESQ. and GEORGE TUCKER, ESQ.
REPORTED BY:	PAUL HAFERLING 301 North Miami Avenue Miami, Florida 33128

* * *

MR. CLARK: It seems to me—we papered over this question and the motions we filed with the Court and Your Honor has considered all those authorities and you made your decision. I can't say that I agree with all that you said but I am willing, subject to reserving my right to bring it up at a later time, to live with whatever Your Honor says.

I think you already made it plain. I think basically we are all in agreement on the basic contours of the action.

This thing about, can we relitigate what happened at the arbitration hearing, that is a crucial question here because did Mr. Alvarez—we will have to talk all around the issue. If we are going to try to ignore that and say that the arbitration opinion is final and binding and we can't relitigate that. Because if that were true, all this about breach of duty of fair representation would not be worth anything because that is the whole point of a breach of duty of fair representation.

If you have the union and the company and they get together and they say, let's get together, let's fix this arbitration hearing, we'll let Mr. Alvarez lose, then there is no way he can bring his case into Federal Court. And that is exactly what they're arguing over there and that's exactly why the courts had implied this cause of action for breach of duty of fair representation. We can't allow that to happen.

As far as how you are going to do the trial, that is up to your discretion. That is pretty clear except for the possibility that Mr. Alvarez is deprived of his right to a jury trial. Any way that you organize the case around this Title 7 count is up to your discretion. If you want to bifurcate it, I think you would be within your discretion to do that.

* * *